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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

314-693

No. 307

NEWARK MORNING LEDGER COMPANY, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Newark Morning Ledger Company, respectfully petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree of said Court entered on rehearing on May 2, 1941 (R. 67-68)[1], modifying and enforcing as modified an order of the National Labor Relations Board (hereinafter called the "Board") which directed petitioner to

[1] The symbol "R." refers to the Transcript of Record. The portion of the record printed as an appendix to the Board's brief in the Court below is designated as "Bd. App."; the appendix to respondent's brief in the Court below as "Resp. App."; Board exhibits are referred to as "Bd. Ex." and respondent's exhibits as "Resp. Ex." Those portions of the record contained in the stenographic transcript but not printed in either appendix are designated by "Tr."

cease and desist from certain unfair labor practices under the National Labor Relations Act (hereinafter called the "Act"), 49 Stat. 449; 29 U. S. C., Sec. 151, *et seq.*, and to take certain affirmative action.

A

Opinions Below

There were two opinions in the Court below, an original opinion and an opinion on rehearing. The original opinion unanimously denied the Board's petition for enforcement and set aside its order. The opinion on rehearing by divided Court completely reversed the former opinion and granted the Board's petition. Both opinions are reported in 120 F. (2d) 262 (R. 27-32, 45-66).

The decision and order of the Board (LEISERSON dissenting) which was enforced as modified by the decree of the Circuit Court of Appeals, is reported in 21 N. L. R. B., No. 95, in a proceeding entitled "In the Matter of Newark Morning Ledger Company and American Newspaper Guild" (Bd. App. 384-418).

B

Statement of Facts

The issues revolve about the discharge by petitioner of a single editorial employee, Agnes Fahy, on September 22, 1937. There was then in existence a collective bargaining agreement between petitioner and Newark Newspaper Guild, the duly designated bargaining representative of the editorial employees (Bd. App. 392). That contract, executed on August 12, 1937, has since been renewed each year (R. 31).

Petitioner publishes a daily newspaper in Newark, New Jersey, known as the Newark Morning Ledger. The present management acquired a bare controlling interest in

May, 1935 (Bd. App. 390), shortly after a crippling nineteen-week strike of the editorial employees and while the business was being operated by trustees appointed by the Chancery Court of New Jersey (Bd. App. 31, 32, 269, 288). Ever since, changes have been made in every department in efforts to increase revenue, improve efficiency and effect economies (Resp. Ex. 75, Resp. App. 163). Among the changes in the editorial department were changes in editorial policy, in news coverage, in style, in news presentation (Resp. App. 47, 67-69); also, the editorial personnel was shifted about and the staff reduced (Resp. Ex. 59, Bd. App. 370-372; Resp. App. 25-26) although the change from a six to a five-day week would normally entail an increase in the staff.

The need for economies which faced the new management when it assumed control, continued despite the numerous changes. For the fiscal years ending April 30, 1936, and April 30, 1937, there were operating deficits of $62,000 and $73,000, respectively (Bd. App. 377, 378, 410). Shortly after Christmas, 1936, difficulties developed with advertisers (Resp. App. 75-76), resulting in a loss in revenue (Bd. App. 410). In August, 1937, a loss of $19,000 was incurred (Bd. App. 410). With particular reference to the editorial department, there was constant criticism that the managing editor was exceeding his budget (Bd. App. 283-285; Resp. App. 76). Then in 1937 occurred a series of events which emphasized the need for further economies and adjustments. In April petitioner announced its intention to institute the five-day week by October 1st (Bd. App. 193). In May the editorial payroll was increased to match the wage scale embodied in the Guild agreement with The Newark Star Eagle, a rival newspaper (Bd. App. 193). In August, 1937, petitioner executed a collective agreement with the Guild resulting in further wage increases (Resp. App. 147; Resp. Ex. 10). A stockholder suit was instituted by the minority common stockholder and former publisher, charging, among other things, excessive pay-

rolls and expenditures (Resp. App. 150). Late in August or early September the managing editor was specifically directed to reduce the editorial payroll (Bd. App. 283-284). This was shortly before the editorial department went on the five-day schedule. These events made it necessary to reconstitute the editorial staff and to effect offsetting economies. The rewrite position held by Fahy was entirely eliminated and she and one other, a non-Guild employee, were discharged (Resp. App. 17, 64).

Regarding Fahy, for many years before the advent of the new management, she was church editor and in charge of women's political news (Bd. App. 63). Among other changes in the editorial department, petitioner, in May, 1937, discontinued these so-called "specialties" of Fahy (Bd. App. 152, 408).[2] Thereby, Fahy's duties to the extent of at least 50%, and more likely as much as 90% were eliminated (Bd. App. 87, 151-152, 221-224, 408; Resp. App. 78, 94). This led the managing editor to suggest her immediate discharge, but he was dissuaded by the city editor, who recommended that Fahy be tried out on rewrite work, to which she was accordingly assigned (Resp. App. 408; Bd. App. 152, 224-225). Six witnesses, including all of the editorial executives, testified that Fahy proved to be lacking in the qualifications for rewrite work on the Ledger, a tabloid newspaper. This testimony stands wholly uncontradicted (Bd. App. 297, 301; Resp. App. 71, 74, 79-80, 83, 89, 93-94, 95, 98-104, 107). Also, Fahy was unhappy in her new duties, she was single, and had no dependents (Bd. App. 153, 185-186). For these reasons and because she was no longer required, Fahy was one of those selected for discharge. A few days later a meeting of the Ledger Unit of the Guild was called to decide whether she was discharged for Guild activity (Resp. Ex. 12; Resp. App. 148-150) and by a ten to two secret vote, Fahy being one of the two, the Unit decided in favor of the management.

[2] In addition, Fahy did general assignment work and some occasional minor rewrite (Bd. App. 62, 63, 188, 209, 221-224, 301).

C

Summary Statement

Claiming that the discharge was due to union activity the Guild filed charges with the Board, and on March 17, 1938, the Board issued its complaint charging violations of Sections 8 (1) and 8 (3) of the Act (Bd. App. 327-330). Hearings were held from July 22, to September 2, 1938. At the close of the Board's case the complaint was dismissed insofar as it pertained to 8 (1) violations other than Fahy's discharge (Bd. App. 386). On March 23, 1940, the Board (LEISERSON dissenting) made its order directing Fahy's reinstatement with back pay and other affirmative action (Bd. App. 416-417). On September 26, 1940, the Board petitioned the Circuit Court of Appeals for the Third Circuit for enforcement of its order and thereafter petitioner duly filed an answer and cross-petition to review and set aside the Board's order. Argument was had on December 16, 1940. On February 3, 1941, that Court, composed of Circuit Judges, MARIS, CLARK and GOODRICH, filed its unanimous opinion setting aside the Board's order (R. 27-32).

On February 7, 1941, the Court below, on its own motion, ordered rehearing before the Court *en banc* (R. 32). Petitioner moved to vacate that order on the ground that it was contrary to Section 117 of the Judicial Code of March 3, 1911, 28 U. S. C. A., Section 212 (R. 44-45). This motion was denied (R. 69). Rehearing was had on February 20, 1941, before the Court *en banc*, and on April 17, 1941, the Court below, Circuit Judge CLARK dissenting, filed its opinion completely reversing its former position and directing the entry of a decree enforcing the Board's order with formal modifications (R. 45-46).

On May 2, 1941, the decree herein was entered directing, *inter alia*, Miss Fahy's reinstatement with back pay (R. 67-68).

A few days before the Court below entered its decree, this Court announced its decision in *Phelps Dodge Corporation* v. *National Labor Relations Board*, ... U. S. ....., 61 S. Ct. 845 (decided April 28, 1941). On the basis of that decision, petitioner moved in the Court below to remand the proceeding to the Board to determine the amount of back pay (R. 69-73), which motion was denied by order dated May 20, 1941 (R. 75-76).

D

Jurisdiction

The decree of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on May 2, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (43 Stat. 938; 28 U. S. C., Sec. 347).

E

Statutes

The pertinent provisions of the statutes and rules of the Third Circuit Court of Appeals involved are set forth in the Appendix, *infra*.

F

Questions Presented

1. Whether under Section 117 of the Judicial Code of March 3, 1911 (36 Stat. 1131, 28 U. S. C. A., Sec. 212), a Circuit Court of Appeals may consist of more than three judges.

2. Whether the discharge of an employee covered by a genuine collective bargaining agreement is an unfair

labor practice under Section 8 (3) of the Act, empowering the Board to institute proceedings under Section 10 (a).

3. Whether the Board's finding that the discharge of Fahy was an unfair labor practice within Section 8 (3) of the Act is supported by substantial evidence where such finding is based upon inferences opposed to the uncontroverted evidence.

4. Whether the determination by the Board, confirmed by the Court below, that there existed a public interest in this case calling for the exercise of the Board's power was not improvident, warranting review and dismissal by this Court.

5. Whether the Board should not in the first instance determine the specific amount of back pay to be awarded and, in making such computation, deduct such amount as the employee failed without excuse to earn.

6. Whether, where the only unfair labor practice found consists of the discharge of but one employee who is ordered reinstated with back pay, and where a genuine collective bargaining agreement exists with the Union, the Board may enter a blanket order restraining generally all violations of Section 8 (3) of the Act and directing affirmative action unrelated to the specific unfair labor practice found.

G

Reasons for Granting the Writ

1. *The order of the Court below* (R. 32) *setting this case down for rehearing before the Court en banc, and the order* (R. 69) *denying petitioner's motion to vacate said order for rehearing, involve the decision of an im-*

portant question of Federal law which has not been, but should be, settled by this Court, and are in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter.

The rehearing *en banc* was ordered by the Court below pursuant to its Rule 4 (1).[3] Petitioner contends that this rule contravenes Section 117 of the Judicial Code, which provides that the Circuit Court of Appeals shall consist of three judges.

This Court has recently granted certiorari on the same question in *Commissioner* v. *Textile Mills Securities Corporation,* 117 F. (2d) 62, cert. granted, ... U. S. ....., 61 S. Ct. 830 (March 30, 1941), decided by the Third Circuit. The holding in that case conflicts with the decision of the Ninth Circuit in *Lang's Estate* v. *Commissioner,* 97 F. (2d) 867, where the Court, relying on Section 117 of the Judicial Code, said:

> "Since no more than three judges may sit in the Circuit Court of Appeals, there is no method of hearing or rehearing by a larger number."

The theory of amendment (or *pro tanto* repeal) by implication, relied on by Judge Biggs, writing for the Third Circuit, is one that is not favored by the Courts (*U. S.* v. *Borden Co.,* 308 U. S. 188, 198; *U. S.* v. *Madigan,* 300 U. S. 500, 506; *U. S.* v. *Noce,* 268 U. S. 613, 619). It is not to be invoked unless the legislative intent is clear and manifest (*Red Rock* v. *Henry,* 106 U. S. 596, 601) and there is no other reasonable construction of the later statute (*U. S.* v. *Munday,* 222 U. S. 175, 184).

We have examined the petition for certiorari in the *Textile Mills* case and the arguments therein advanced (at pp. 17-19) apply with even greater force to the instant case where the rehearing before the Court *en banc* was ordered after a unanimous decision by a three-judge court in favor of petitioner. By its very nature and purpose, rehearing

[3] No other Circuit Court of Appeals has promulgated such a rule.

implies reconsideration by the same judges who rendered the decision sought to be reargued and precludes participation by judges who had no part in the original decision (*World's Columbian Exposition Co.* v. *Republic of France*, 96 Fed. 687, 688; *Gas Products Co.* v. *Rankin*, 63 Mont. 372, 397).

It may not be urged that petitioner was not prejudiced since two of the three judges who participated in the original hearing changed their decision on the rehearing. The fact remains that the later decision was made by five Circuit Judges who did not, under Section 117 of the Judicial Code, legally constitute a Circuit Court of Appeals.

2. *The decision of the Court below, in holding that the discharge of an employee covered by a valid existing collective bargaining agreement is an unfair labor practice under Section 8 (3), empowering the Board to proceed under Section 10 (a), involves the decision of an important question of Federal law which has not been, but should be, decided by this Court, and one which has been decided by the lower Court in a way probably in conflict with principles established by this Court.*

The mere fact that the Court below was constrained on the rehearing to completely reverse its original decision on this question almost, in and of itself, is sufficient to warrant review by this Court. However, the question involved is of such vital importance in the administration of the National Labor Relations Act, that we feel that we may justifiably discuss the issues at some length.

The Board may deal only with such acts (by statutory definition "unfair labor practices") as interfere with collective bargaining and self-organization (R. 47).[4] In its original opinion the Court below held that the discharge of Fahy was not such an unfair labor practice, pointing out that it could not "possibly have the effect of interfering

[4] *N. L. R. B.* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1; *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197; *Heinz Company* v. *N. L. R. B.*, 311 U. S. 514.

with, restraining or coercing the employees in exercising a right of collective bargaining which has already been fully and successfully exercised by them" (R. 31). Hence, it held that the Board did not have jurisdiction to deal with that discharge.

In its opinion on rehearing the Court below reversed its position, declaring that it had placed "too narrow a construction" on the Act (R. 46). It evolved the theory that Section 7 guarantees to employees a "continuing right" of collective bargaining and a "continuous right" of organization, after, as well as before, the signing of a particular collective bargaining agreement (R. 48). Upon that theory it held that the Board's finding that Fahy was discharged for Guild activities and that this discouraged membership in the Guild established the existence of an unfair labor practice with which the Board was empowered to deal even though the discharge occurred after the making of a concededly genuine collective bargaining agreement (R. 49).

In considering the question of the scope of the Act and the Board's power under it, we submit that it is essential to draw a dividing line between the period preceding the making of a collective agreement and the period following the making of such an agreement. For the Act does not cover the entire realm of industrial strife. It covers only the period preceding collective bargaining, and, therefore, preceding the execution of a collective agreement.

Prior to the statute the employee was remediless, except for economic action. His bare legal rights to organize and to bargain collectively were rendered valueless by the employer's legal right to refuse to bargain and to undermine and destroy employee organization. Under the Act the employee is protected from the destructive tactics of the employer. This protection is accorded for the very purpose of strengthening employee organization, to establish equality of bargaining power, and finally to achieve collective bargaining and the industrial peace which follows in its wake.

It is, therefore, during the period preceding collective bargaining that there exists the public right and the occasion for the public remedy.[5] For during that period there is no private right in the employee; he has no private remedy available to him.

The final step in the bargaining process is the making of the collective agreement (*Heinz Company* v. *N. L. R. B., supra*). Its execution marks the end of the period preceding collective bargaining. With its execution is ended the public interest, or the need for the public remedy. The period of employee helplessness is over. Equality of bargaining power has been achieved. The policy of the Act has been attained. Private rights in the employee have been created, which, we submit, supersede the public rights under the statute. Acts committed by the employer before the collective agreement are labelled "unfair labor practices". The same or similar acts after the agreement, are labelled "breach of contract". Before the contract is made the unfair labor practices are prevented by force of the statute implemented by the administrative process of the Board. After the contract is made the same acts are prevented by force of the contract implemented by the judicial process.

Congress did not legislate with respect to the period following the execution of the collective bargaining agreement, nor was there any need for it to do so. Collective bargaining was not then unknown. It had achieved peace in the industries where it was utilized[6] and the Act was designed merely to extend its benefits to industry generally. It must be assumed that Congress knew that the laws of contract were applicable to collective agreements

[5] Report of N. L. R. B. to Senate Committee on Education & Labor, 76th Cong., 1st Sess. (Hearings on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, S. 2123), p. 476; Statement of William M. Leiserson, Hearings, *supra*, p. 918 (references to source materials in this brief are, mainly, in addition to those set forth by Judge CLARK in his dissenting opinion [R. 52-66]).

[6] Sen. Rep. 573, 74th Cong., 1st Sess.

and adequately covered those rare instances where such a contract was violated.[7] We submit that this is the essence of the whole legislative scheme. The statute created no new rights. It merely made possible, by eliminating the obstacles in the way of, the attainment of existing rights. In other words, the public right has for its ultimate objective the attainment of the private right under the collective bargaining agreement.

The foregoing analysis is fully documented in the original opinion and in the dissenting opinion of Judge CLARK on rehearing (R. 52-66) which, we submit, reached the correct conclusion with respect to the scope of the Act and the powers of the Board under it.

We discuss next the theory of a continuing right of collective bargaining which is the central theme of the opinion on rehearing. A right of bargaining continuing after the execution of an agreement is a conflict in terms. Under established principles of law there can be no right of bargaining with respect to a contract already executed. Collective agreements are no exceptions. As in other contracts, bargaining ends when such a collective agreement is executed. For, as this Court has held, the contract is "the final step in the bargaining process" (*Heinz Co.* v. *N. L. R. B., supra*).

Further, a continuing right to bargain, far from promoting the policy of the Act, is actually destructive of it. It would continue, and not end, the unrest which preceded the making of the contract. This Court has declared that

[7] Rosenfarb, "The National Labor Policy and How It Works", pp. 200, 260; Teller, "Labor Disputes and Collective Bargaining", Secs. 87, 163, 165-166; International Juridical Ass'n Monthly Bulletin, Jan., 1939, p. 84; Statement of J. Warren Madden, Senate Committee on Education & Labor, 76th Cong., 1st Sess. (Hearings, *supra*), p. 204; *In re Williams Coal Co.*, 11 N. L. R. B., 579, p. 645; *In re Essex Wire Co.*, 19 N. L. R. B., 51. In a broadcast on the American Forum of the Air (Jan. 29, 1939, p. 15) Charles Fahy said: "If you are talking about breach of contract, breach of contract on the part of a union is certainly not a national evil any more than breach of contract on the part of the employers is a national evil which would cause Congress to legislate on it."

such a contract is binding on both parties (*N. L. R. B.* v. *Sands Manufacturing Co.*, 306 U. S. 332). That being so the employer has the right to rely on it as drawn. Otherwise there is no legal or practical advantage in making the agreement. Employers will decline to enter into collective agreements if the employees possess the legal right to demand modifications in disregard of their signed contract. That is not to say that an employer will refuse to discuss these matters, any more than a landlord will refuse to discuss rent reductions, or a mortgagee changes in interest rate. But to hold that the Act imposes legal compulsion to discuss changes in an existing agreement is, in final analysis, a destruction of that agreement.

Regarding the further theory of a continuous right of employee organization, the Court below errs in attributing to Congress an intent to guarantee that right "after the signing of a collective agreement as well as before". As shown above, Congress did not legislate with respect to the period following the execution of a collective agreement. Further, the right of organization is merely incidental to, and not equal with, the right of collective bargaining.[8] Where, as here, the greater right of collective bargaining exists it necessarily embraces the lesser right of organization. Finally, once a union is recognized by the making of a collective agreement with it, the almost universal practical effect is that such a union acquires organizational strength and continues effectively to represent the employees. The statute but paves the way. Illustration of this is found in this case where, after prolonged negotiation a collective agreement was made in 1937, which has been renewed every year since then.

Concerning the question of the public right versus the private right, we point out that, concededly, there was

[8] Rotwein, "Labor Law", Ch. XII, § 149, p. 142; Benedict Wolf, "The Duty to Bargain Collectively", p. 243; N. L. R. B., 3rd Annual Report, p. 108; *N. L. R. B.* v. *Sterling Electric Motors*, 109 F. (2d) 194, 198; Statement of Donald W. Smith, Sen. Comm. on Education and Labor, 76th Cong., 1st Sess., Hearings, *supra;* Statement of Charles W. Fahy, Hearings, *supra*, p. 444.

a valid agreement under which Fahy and the Guild could have procured, in their private interest, adequate and speedy private remedy through the Courts. In its original opinion the Court below held that, therefore, Fahy's discharge did not call for the exercise by the Board of the public remedy in the public interest to effect the public policy of the statute. However, on rehearing, the Court shifted its position. It held that it was not called upon to determine whether Fahy had a private right and further that the existence of such a private right in no way affected the public right or the Board's exclusive jurisdiction to enforce it.

The refusal of the Court below to concern itself with the private right and the private remedy is, we submit, basic error. For the existence of such a complete and speedy private remedy in what is wholly a private controversy, establishes a complete lack of public interest. And in the absence of such a public interest the Board does not have the power to proceed. This was the specific holding of this Court in *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, cited by this Court with approval in *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, and *National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350.

The second sentence of Section 10 (a) which is quoted by the Court below (R. 50) does not support the Court's holding that the existence of the private right in Fahy did not affect the public right or the jurisdiction of the Board to enforce it. The second sentence of that section does not enlarge the grant of power contained in the first sentence which, concededly, limits the Board's jurisdiction to those unfair labor practices which interfere with collective bargaining and self-organization. Further, the intent of the second sentence is revealed by its legislative history. The Act is an outgrowth of the National Industrial Recovery Act, the administration of which was committed to a number of boards and agencies. Some of these were established by codes of fair competition, others by executive order of the President; in addition there were so-called "President Re-employment Agreements" applicable to busi-

nesses where no codes were established. As a result administration under the National Industrial Recovery Act was beset with difficulties and delays due to lack of centralization of authority. It was this condition which Section 10 (a) rectified. The legislative history makes understandable the terms "code" and "agreement" used in that section, and establishes that they refer to the codes and agreements under the earlier statute. This is confirmed by Section 8 (3) of the Act under which the closed shop is preserved despite "anything in this Act or the National Industrial Recovery Act as amended from time to time, or in any code or agreement approved or prescribed thereunder." Further, it must be considered that the Act does not repeal the National Industrial Recovery Act, but merely provides that in case of conflict between the two, the National Labor Relations Act shall prevail (Sec. 14). It follows, that the second sentence of Section 10 (a) does not, as the Court below contends, enlarge the scope of the Act or the power of the Board. It merely concentrates in the Board all of the administrative processes under the Act.[9]

There is here involved a problem of growing importance, namely, the division of responsibility between the Courts and the increasing number of administrative agencies. This calls for the separation of the administrative process from the judicial process. Only in this way can administrative law attain its proper place in the body of general law. The necessity for this "division of responsibility" has been recognized. (*Williamsport Wire Rope Company* v. *U. S.*, 277 U. S. 551; *Progressive Mine Workers of America* v. *National Labor Relations Board*, U. S. C. A., D. C., decided October 22, 1940.)

The point at which the division of responsibility occurs clearly appears from the Act. On one side is the public

[9] Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 15; Statement of Charles Fahy, Hearings, *supra*, p. 347; Report of N. L. R. B., Hearings, *supra*, p. 578; Rosenfarb, "The National Labor Policy and How It Works", p. 477; *W. L. R. B.* v. *Reuping*, 228 Wis. 473, 483.

policy of encouraging collective bargaining, the public duty of preventing unfair labor practices, and the public remedy by which this policy and duty is made effective. This is administrative and falls within the jurisdiction of the Board. Once a collective agreement is executed, the protection of the rights created by that agreement is the responsibility of the Courts. It may, in fact, be said that the whole scheme of the public function under the Act is to bring about a justiciable relationship cognizable in the courts. The Courts have carefully refrained from encroaching upon the territory assigned to the administrative agencies (*Fed. Communications Commission* v. *The Pottsville Broadcasting Co.*, 309 U. S. 134; *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206). It is at least equally important, in fact more important, that these agencies should be restrained from encroaching upon the jurisdiction and authority of the Courts.

There is here involved an important question of jurisdiction under the National Labor Relations Act concerning an important phase of administration of the federal statute. Petitioner submits that questions of such vital importance nationally should be ultimately determined by this Court.

3. *The decision of the Court below, in holding that the Board's finding that Fahy's discharge was in violation of Section 8 (3) of the Act is supported by substantial evidence, involves the decision of an important question of Federal law which has been decided by the Court below in a way probably in conflict with principles established by this Court in decisions relating to the same matter.*

What distinguishes this case is that almost wholly the evidence regarding the reasons for Fahy's discharge is uncontroverted and the Board's finding that Fahy was discharged for union activity is directly opposed to that uncontroverted evidence. By the Board's findings, it necessarily rejected petitioner's contentions that the fac-

tors in this discharge were *first,* the need for economies, *second,* Fahy's inability to satisfactorily perform her duties and her general dispensability. In none of the opinions in the Court below was the evidence reviewed.

(a) *The need for economies as an impelling factor in the discharge of Fahy*: The Board's conclusion that the need for economies was not a factor in Fahy's discharge is not only directly opposed to the uncontradicted evidence but, as well, to the Board's findings of fact (Bd. App. 410). Beginning with the taking over of a business then in receivership (Bd. App. 410) and which had just emerged from a long strike and stockholder litigation (Bd. Ex. 10, Resp. App. 131), the findings show continued and increasing losses for the succeeding years (Bd. App. 410), despite changes in all departments (Resp. Ex. 75, Resp. App. 163; 47, 67-69).

In the Court below the Board relied on two "factors" to justify its conclusion that the need for economies did not enter into Fahy's discharge.[10] There were *first* that petitioner's financial condition was not "newly arisen" and *second,* that between April, 1937, and September, 1937, petitioner hired eight editorial employees and discharged but seven.

Concerning the first, it should be obvious that the need for economies was not lessened because the financial stringency was not "newly arisen". To the contrary, continuing and persistent losses will render that need all the more urgent. Besides, many of the conditions were "newly arisen",[11] and, added to the older conditions, made

[10] Board's brief, pp. 30-31.

[11] These included difficulties with advertisers (Resp. App. 75-76); the imminent institution of the five-day week (Bd. App. 193); the increased editorial payroll to match the wage scale of a rival paper (Bd. App. 193); the additional payroll increases under petitioner's agreement with the Guild; which also called for the five-day week by October 1st (Resp. Ex. 10, Resp. App. 147); the stockholder's suit which, among other things, charged excessive payrolls (Bd. App. 283-284); and the $19,000 loss incurred for the month of August, 1937 (Bd. App. 410).

economies mandatory. They required the reconstitution of the editorial staff and resulted in instruction to the managing editor to reduce the payroll (Bd. App. 283-284). Following his instructions the managing editor discharged two editorial employees, a non-Guild member and Miss Fahy. Her job was eliminated and no one has ever been hired to do her work.

Concerning the second "factor", we submit that more than a mere count is involved.[12] It was conceded that no new rewrite employee was hired (Resp. App. 179). There are many different types of work in the editorial department. The managing editor testified that the change to the five-day week made it necessary to anticipate the need for another artist, an added man in the sports department, another man on the copy desk, and perhaps another photographer (Bd. App. 154, 194). This emphasized the necessity to effect offsetting economies and to reconstitute the staff (Bd. App. 192).

Even on the basis of mere numbers, ordinarily the change to the five-day week would entail a staff increase of approximately 20%. However, as the Board has shown, the Ledger added only one employee, representing approximately a 2% increase. Nor did the reduction of personnel stop with the discharge of Fahy. Starting in May, 1935, with a total of 51, the editorial staff was reduced to 45 by September 22, 1937, and further reduced to 38 by August 15, 1938, despite the change to the five-day week (Resp. Ex. 59, Bd. App. 370-372).

We respectfully urge that the uncontroverted evidence compels a finding that the need for economies was a vital factor in Fahy's discharge and that the Board's findings to the contrary cannot be sustained.

(b) *Fahy's inability to satisfactorily perform her duties and her general dispensability:* One of the main changes induced by the need for economies, the discontinuance of the church page and special handling of women's political

[12] Resp. App. 179.

news in May, 1937, was of utmost importance in connection with Fahy. These had been her special fields and consequently at least 50%, and more likely 90%, of her work was eliminated. Although her discharge was then considered, she was allowed to stay and was tried out on rewrite, but she proved unsatisfactory at her new assignment.

The four top executives of the editorial department (the managing editor, city editor, news editor, and head of the copy desk) testified that Fahy lacked the qualifications for rewrite work on the Ledger (Bd. App. 297, 301; Resp. App. 71, 74, 79-80, 83, 89, 93-94, 95, 100-104, 107). A fifth witness, Menagh, on this subject a Board witness, although called by petitioner, testified to similar effect, pointing out that Fahy as a "conservative" writer lacked the "sensational touch", the "smoking-up", the "imaginative writing" required by a tabloid like the Ledger (Resp. App. 98-100).[13] A sixth witness, Rogers, testified that he did not consider Fahy as qualified (Resp. App. 93-94). Not a single witness disputed that appraisal. In fact, Fahy's own testimony tends to support it.[14] Nevertheless, the Board found that Fahy was qualified and that petitioner so regarded her. In so doing, it resorted to unwarranted inferences based on untenable assumption.

The Board assumed that Fahy did a "substantial" amount of rewrite work, to petitioner's satisfaction, prior to May 18, 1937 (Bd. App. 408, 412). From this it inferred that Fahy did not lose her competence after May 18, 1937, and hence she was qualified (Bd. App. 412). The record refutes the Board's basic assumption. To begin with, prior to May 18, 1937, Fahy's special fields occupied not less than 50% and more likely 80 to 90% of her

[13] It may be suggested that because of her years of service on the church page Fahy was unable to acquire this "sensational touch".

[14] Fahy's testimony tends to corroborate petitioner's witnesses in that she stated she desired restoration to "work which I am capable of performing and have performed * * * for years" (Resp. App. 33-34), which obviously does not refer to rewrite.

time (Bd. App. 221-225; Resp. App. 78-79, 94). In addition she did "general assignment work" (Bd. App. 62) which consists mostly of reportorial duties and only "occasional", "minor" rewrite (Bd. App. 188, 209, 221-222, 301), which latter fact is obscured by the Board's use of the term "general reportorial work" (Bd. App. 412).[15] This "occasional", "minor" rewrite is vastly different from the work expected of a full-time rewrite person. In the case of the latter, a more exacting standard is called for.

Besides, other considerations made Fahy dispensable. Her position could be and was wholly eliminated and has never been restored. Also, she was single, without dependents, and admittedly unhappy in her new duties.[16]

Consistent with the Board's rejection of the uncontroverted evidence bearing on Fahy's discharge, summarized above, it has likewise rejected the uncontroverted proof of events immediately preceding and surrounding the discharge, and instead relied largely on the "background"[17] for its finding of anti-union hostility. The theory of the

[15] The difference between rewrite and general assignment is almost self-evident. In the latter the emphasis is on the gathering of news while in the former the emphasis is on the writing up of news gathered by others calling for a higher standard of literary style.

[16] Fahy's testimony revealed her unhappiness (Bd. App. 103, Resp. App. 33, 34, 131; see also Oral Argument, p. 49); her attitude was sharply reflected in her "parading" up and down the editorial room for extended periods of time (Bd. App. 103), as well as her request for time off to attend a Guild meeting "at her own expense" (Resp. App. 132) despite her knowledge that no Guild member's pay had ever been docked for time taken to attend such meeting.

[17] The background comprised conservatively 85% of the 5,000 pages of stenographic transcript. It covered a period even antedating the new management. It was originally introduced in connection with charges of Section 8 (1) violations which were dismissed at the hearing. Nevertheless, over objection, it was allowed to remain in the record (Bd. App. 390), from which Board Member Leiserson specifically dissented (Bd. App. 418) which view was concurred in by the Court below in its original opinion (R. 32).

Board seems to be that petitioner's alleged anti-union hostility of 1935 was projected over the years to the discharge of Fahy, and upon this theory, the Board inferred that Fahy's discharge was discriminatory. Petitioner respectfully urges that the events preceding and surrounding Fahy's discharge effectively breaks any possible chain of causation between the incidents of 1935 and that discharge in 1937.

Even as far back as 1935, the uncontroverted evidence discloses no hostility between petitioner and its employees comprising the Ledger Unit. Concededly there was some distrust and suspicion of the Guild leadership, but not of the Unit or its leadership. The Guild leaders were almost wholly employees, and at least in one instance an executive, of rival newspapers (Resp. App. 12, 14). Events proved that these leaders were more intent upon fomenting strikes and discord on the Ledger than bringing about the consummation of a collective agreement (Resp. App. 12, 14). This was the view not only of petitioner. It became the conviction of the Ledger Unit as well, resulting in a sharp cleavage in the organization (Resp. App. 127-131, 139, 143, 166-175). So far as relations between petitioner and the Unit are concerned, except for the first few months in 1935, they were harmonious. In fact, twice during the latter part of 1935, once in November and again in December, the petitioner and the Unit reached complete agreement upon the terms of a collective contract, but in each instance the consummation of that contract was thwarted by the Guild's flat refusal to follow the Unit's instructions (Bd. Exs. 11, 12; Bd. Ex. 15, Bd. App. 335, 392-393).

This established, without contradiction, petitioner's willingness to adopt the procedure of collective bargaining with its own employees constituting, as the Board has found, "a unit appropriate for the purposes of collective bargaining" and insuring to "employees the full benefit of the rights to self-organization and to collective bargaining and otherwise" effectuating the policies of the

Act (Bd. App. 392). And clinching this is the fact that in 1937 petitioner did execute a collective bargaining agreement once the Guild leaders ceased their obstructionist tactics.

The Guild agreement of August 27, 1937, signalizing petitioner's full compliance with the Act, bars any inference of hostility based on earlier incidents. Such inference is cancelled out by the collective bargaining agreement, the ultimate goal of the statute. This is especially true where, as in this case, the contract of 1937 has been renewed every year, evidencing the continued existence of effective employee organization and conclusively destroying any claim of union impairment.

Another incident, contemporaneous with Fahy's discharge, is of utmost importance. In accordance with the Guild constitution making it "the duty of the Unit * * * to maintain the observance or enforcement of all * * * agreements" (Resp. App. 146), there was submitted to the Ledger Unit the question whether Fahy's discharge was for Guild activity (Resp. App. 148-150). The Unit, by secret ballot and with almost complete unanimity, absolved petitioner of any impropriety in discharging Fahy. This verdict of Fahy's co-workers, the ones best acquainted with her work, her qualifications and her mental attitude, as well as with the facts surrounding her discharge, is entitled to the greatest weight. Instead it was completely ignored, the Board failing even to mention it in its decision.

Other evidence of contemporary incidents destructive of the inference of anti-union hostility based on the background of 1935 is to be found in Fahy's own testimony. She testified affirmatively that she was not discriminated against (Resp. App. 21, Bd. Ex. 10, Resp. App. 131). She was permitted to collect union dues during working hours (Resp. App. 47). She, as well as others, was given time off to attend Guild meetings (Bd. App. 100-102), and on one occasion her hours were changed to enable her to do so (Bd. App. 101-102). Her vacation was

arranged so that she could attend a National Guild convention (Bd. App. 101, 153).

Fahy's militancy was neither secret nor of short duration (Bd. App. 405-407), but she continued to retain her job even though many others lost theirs (Bd. App. 370-372), and, finally, when the dropping of the church page gave petitioner the perfect opportunity to rid itself of this militant union leader, she still kept her job.

Thus it is seen that in support of its conclusion that Fahy was discharged because of union activity, the Board has been able only to adduce facts which at most are limited in their scope to a showing that petitioner had an anti-union attitude with respect to the Guild Local. The essential fact, that her discharge in 1937 was discriminatory, is sought to be inferred from that anti-union attitude; an inference the Board is compelled to draw because there is absolutely no direct proof of a discriminatory act against her. To draw this inference, however, the Board has disregarded the uncontroverted and unimpeached evidence which showed (1) Fahy's inability to do her work; (2) petitioner's need for economies as an important factor in her discharge; (3) her own admissions that no discrimination had been practiced against her; (4) the contemporaneous decision of her co-workers and fellow Guild members to the same effect; and (5) the Guild contract of August, 1937, evidencing the end of pre-existing hostility, if any there was.

The principles established by decisions of this Court clearly demonstrate that the Board's finding that Fahy's discharge was for union activity is without substantial evidence and cannot be permitted to stand. By uncontradicted evidence petitioner showed the real reasons for her discharge, reasons that had nothing to do with her union activity. Such a discharge is not prevented by the Act (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1). The fact that rules of evidence shall not be controlling under Section 10 (b) of the Act does not permit the Board to make orders that are not based on

evidence having rational probative force (*Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197). In the absence of contrary *proof* it cannot be assumed that petitioner in discharging Miss Fahy violated the Act; the propriety of that discharge must be presumed until the contrary has been established by *proof* (*Cincinnati, New Orleans & Texas Pacific Rwy.* v. *Rankin*, 241 U. S. 319, 327). The requisite proof cannot be supplied by a mere inference which is drawn in the face of direct and uncontradicted evidence to the contrary (*Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U. S. 333, 340; *Southern Railway Co.* v. *Walters*, 284 U. S. 190, 194).

4. *The decision of the Court below confirming the determination by the Board that this proceeding was in the public interest involves the decision of an important question of Federal law which has not been but should be decided by this Court, and which has been decided by the Court below in a way probably in conflict with the principles established by decisions of this Court.*

Assuming, *arguendo*, that the Board otherwise had the power to proceed in this case, we agree that this power is not to be exercised unless there is so substantial an interference with the public right as to require restraint in the public interest (R. 51). That decision, the Court below further held, rests in the discretion of the Board (R. 51).

Under the decision of this Court in *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, the existence of a public interest is a jurisdictional fact and the determination of that issue by the administrative agency is subject to complete judicial review; and where it appears that there is no public interest, this Court will dismiss the proceeding. The *Klesner* case, although arising under the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. 45), is directly applicable to the case at bar, for the National Labor Relations Act and the procedure thereunder were specifically drawn in analogy to the Federal Trade Com-

mission Act and the procedure under that statute (*Amalgamated Utility Workers, etc.* v. *Consolidated Edison Co. of N. Y.*, 309 U. S. 261; *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350).

In this case it is revealed that at the time of Fahy's discharge there was in existence a valid collective bargaining agreement. The discharge of Fahy, if discriminatory, was a violation of that agreement giving rise to a private controversy for the determination of which there existed adequate and speedy private remedies at law and in equity. Hence, there was no specific and substantial public interest calling for the Board's exercise of its powers (*Federal Trade Commission* v. *Klesner*, supra). Also, under the grievance clause of the contract itself, Fahy was accorded a further private remedy which she invoked. As a result there was submitted to the Ledger Unit, in accordance with the Guild constitution, the question whether Fahy's discharge was for Guild activity. By an almost unanimous vote the Ledger Unit determined that the discharge was not. In view of this determination by the very labor organization directly involved, we submit that there exists no public interest calling for the intervention of the Board. Emphasizing this is the fact that the original collective agreement has been renewed year after year, completely confirming that by Fahy's discharge the Guild's effectiveness was not in any way impaired either in respect of organization or collective bargaining.

Petitioner respectfully submits that on all of the facts herein it is clear that this controversy was essentially private in nature; that there was no public interest involved which called for the exercise of the public remedy. In view of this, upon review by this Court, the proceeding should be dismissed.

5. *The decision of the Court below enforcing the Board's order of reinstatement with back pay, in failing to direct (a) that the specific amount of back pay be computed by the Board, and (b) that such amounts as the*

employee failed without excuse to earn should be deducted in computing such award, involves the decision of an important question of Federal law, and which has been decided by the Court below in a way probably in conflict with principles established by this Court in decisions relating to the same matter.

The record shows that during the period between her discharge and the hearings, about a year later, the employee made absolutely no efforts to secure any other newspaper position, and that her sole attempts to secure employment of any nature were limited to two lone attempts to secure publicity jobs (Resp. App. 21, 29-31); also that petitioner's attempt at the hearing to fully probe into these efforts were hampered if not entirely prevented by the Trial Examiner (Resp. App. 29-31). The record is, of course, silent with respect to her earnings or efforts to earn money during the period of two and one-half years between the close of the hearings and the entry of the decree.

This Court held in *Phelps Dodge Corporation* v. *National Labor Relations Board*, ... U. S. ....., 61 S. Ct. 845 (decided April 28, 1941), that there should be deducted from the amount of back pay awarded such amounts as the employee failed without excuse to earn, and that the computation should be made by the Board in the first instance.

On the basis of that decision, which was handed down after the decision on rehearing in the instant case, petitioner moved in the Court below to remand this case to the Board for the purpose of computing the amount of back pay required to be paid. By order dated May 20, 1941, the motion was denied (R. 69-73, 75-76). In opposing the motion the Board urged that the *Phelps Dodge* case was inapplicable because there was no evidence that Miss Fahy had "rejected" available employment (R. 74). The Board did not, as it obviously could not on the record here, contend that Miss Fahy had made reasonably sufficient efforts to secure other employment. Thus

the question on this phase of petitioner's application was narrowed down, essentially, to what this Court had meant in the *Phelps Dodge* case when it stated that "only actual losses should be made good" and that "deductions should be made not only for actual earnings by the worker but also for losses which he wilfully incurred". Petitioner respectfully submits that losses incurred by the worker because of his failure to make reasonably sufficient efforts to secure other employment are and were so intended in the *Phelps Dodge* decision as much "wilfully incurred" as losses suffered because of his rejection of available employment.

Since the denial of petitioner's motion the Court below has apparently changed its position. We refer to *N. L. R. B.* v. *Surburban Lumber Company*, ... F. (2d) ..... (decided June 30, 1941), where the Third Circuit by unanimous opinion of the Court *en banc* fully accepted the doctrine that the discharged employee is required to make reasonable efforts to seek other work and remanded that case to the Board for determination of that issue. It cannot be urged that the Board here found Fahy's efforts to have been reasonable, for prior to the *Phelps Dodge* decision it had never even acknowledged the existence of such an obligation. Thus the affirmance of the back pay award, and the denial of petitioner's motion for remand to the Board, are directly opposed not only to the *Phelps Dodge* decision of this Court but also to the later decision of the Third Circuit itself.

Petitioner respectfully submits that the foregoing issues are of substantial public importance in the administration of the Act and were decided by the Court below in a way probably in conflict with the principles established by this Court in its decision in *Phelps Dodge Corporation* v. *National Labor Relations Board, supra.*

6. *The decree of the Court below, restraining generally all violations of Section 8 (3) of the Act and directing affirmative action unrelated to the discharge of the*

one employee, which was the only unfair labor practice found, involves the decision of an important question of Federal law and one which has been decided by the Court below in a way probably in conflict with principles established by this Court in decisions relating to the same matter.

The only unfair labor practice found being a single, isolated discharge of one employee in September, 1937 (over three and one-half years before the entry of the decree), the Court below appropriately held that a blanket restraining order would be improper (R. 51-52).

In entering the decree, however, it enjoined petitioner from:

> "1(a) Discouraging membership in American Newspaper Guild, in Newark Newspaper Guild, and in the Ledger Unit thereof, or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employment or any term or condition of employment because of membership in or activity on behalf of any such labor organization" (R. 67).

Thus, although there is concededly no evidence that petitioner has discouraged membership in any labor organization of its employees other than the Guild (and the record shows that such other labor organizations do exist among petitioner's employees) petitioner is constantly under a threat of punishment for contempt in any of its dealings with such other labor organizations or such of its employees who are members of other labor organizations. Under this decree, any time petitioner discharges an employee who is a member of any labor organization other than the Guild it is immediately subject to possible contempt proceedings on the ground that the discharge was for union activity, without having first had the opportunity of defending itself against the charge of discrimination. Thus the Circuit Court of Appeals in the first instance would be called upon to decide the questions of fact and labor relations in issue. In addition,

petitioner is under the same threat of immediate contempt proceedings in any of its dealings with its other employees who are members of the Guild. Any time a Guild member is discharged or has his duties changed, the claim of discrimination may result in proceedings to punish for contempt without the necessity of a hearing before the Board as contemplated by the Act.

Finally, the form of notice required to be posted is improper. In paragraph 2 (c) of the decree there has been a departure from the Board's usual practice. It will be recalled that the Board's original form of notice was, in effect, a confession of guilt; and that after this Court expressed its disapproval in *N. L. R. B.* v. *Express Publishing Co.*, ... U. S. ....., 61 S. Ct. 693, the Board changed its practice to require a notice which stated that the employer will not engage in the conduct from which he is ordered to cease and desist and will take the affirmative action which he has been ordered to take.

Here, however, has been added the requirement that the notice contain the following statement:

> "that the respondent's employees are free to become or remain members of American Newspaper Guild, Newark Newspaper Guild, and the Ledger Unit thereof, and that the respondent will not discriminate against any employee because of membership or activity in that organization" (R. 68).

The existence of a collective agreement between petitioner and the Guild completely establishes the absence of discrimination against the Guild, and this departure from the Board's usual practice is wholly unjustified by the facts of this case and in no respect effectuates the purpose and policy of the Act.

In these respects, petitioner submits, the provisions of the decree of the Court below are improper and should be modified by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a transcript of the record in and all proceedings had in such cause, to the end that the decree enforcing the order of the National Labor Relations Board as placed in issued by the questions presented by this petition may be reviewed and determined by this Court; that said decree be set aside and reversed by this Court; and that petitioner be granted such other and further relief as may be just and proper.

Dated, July 23rd, 1941.

CHARLES GOLDMAN,
Attorney for Newark Morning Ledger Company, Petitioner.

APPENDIX

Statutes and Rules Involved

National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.)

Sec. 2. (8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted

by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

Sec. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or

is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

Sec. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act [U. S. C., Supp. VII, title 15, sec. 707 (a)], as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" [48 Stat. 922, pars. (l) and (m)], as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Judicial Code, Section 117 (U. S. Code Annotated, Sec. 212)

There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

Rules of the United States Circuit Court of Appeals for the Third Circuit, Rule 4 (1)

1. THE COURT—JUDGES WHO CONSTITUTE IT—NUMBER OF JUDGES TO SIT. The court consists of the circuit justice, when in attendance, and of the circuit judges of the circuit who are in active service. District judges and retired circuit judges of the circuit sit in the court when specially designated or assigned as provided by law. Three judges shall sit in the court to hear all matters, except those which the court by special order directs to be heard by the court en banc.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 307

NEWARK MORNING LEDGER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the three-judge court below (R. 27–32)[1] is reported at 120 F. (2d) 262. The opinions of the court below, sitting *en banc* on rehear-

[1] Pursuant to stipulation of the parties (R. 77–78), the printed record herein for purposes of the petition for certiorari consists of: (1) the appendix to the Board's brief filed in the court below, which will be designated by the symbol (B. A.); (2) the appendix to petitioner's brief filed in the court below, which will be designated by the symbol (P. A.); (3) the proceedings in the court below, which will be designated by the symbol (R).

ing (R. 46–66), are reported at 120 F. (2d) 266. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 384–417) are reported at 21 N. L. R. B. 988.

JURISDICTION

The decree of the court below (R. 67–68) was entered on May 2, 1941. A petition for modification of the decree filed by petitioner (R. 69–73) was denied on May 20, 1941 (R. 76). The petition for a writ of certiorari was filed on July 24, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether a circuit court of appeals may be composed of all the circuit judges in active service sitting *en banc*.

2. Whether the existence of a collective bargaining agreement between an employer and his employees deprives the National Labor Relations Board of jurisdiction to maintain proceedings under the National Labor Relations Act to prevent employer conduct otherwise violative of the Act's prohibitions.

3. Whether, in an unfair labor practice case, the existence of a sufficient public interest is a necessary condition to the Board's maintenance of proceedings under the Act, and, if so, whether the Board's determination of that preliminary issue is subject to judicial review.

4. Whether there is substantial evidence to support the Board's findings that petitioner discriminatorily discharged an employee in violation of Section 8 (3) and (1) of the Act.

5. Whether the case should have been remanded to the Board to determine the specific amount of back pay due and any amount which the employee failed without excuse to earn.

6. Whether the cease-and-desist provisions, to the extent enforced by the court, and the notice provisions of the Board's order are proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to the petition (pp. 31–33).

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (B. A. 384–417). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

For more than two years after June 1935, the Newark Newspaper Guild, a labor organization representing petitioner's employees, unsuccessfully sought a collective agreement with petitioner; throughout the period petitioner consist-

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

ently evidenced antagonism to the Guild.[3] On August 12, 1937, petitioner and the Guild entered into a collective agreement which, among other things, prohibited discrimination by the employer on account of membership or activity in the Guild (B. A. 401; P. A. 147, B. A. 367). On September 22, 1937, petitioner published an anti-Guild editorial (B. A. 403–405, 414; B. A. 360–363); on the same day it discharged Agnes Fahy, an editorial employee with third highest seniority (B. A. 405, 409–410; B. A. 106–107, 62–63). Fahy had been an officer of the Guild and had become its president in August 1937. She was an advocate of a vigorous trade-union policy in respect of the Guild's dealings with petitioner, and was a leader of the Guild activities which petitioner had opposed during the preceding two years. At the time of her discharge, she was the only person

[3] Petitioner's managing editor inveighed against the Guild and cautioned employees against Guild membership (B. A. 390–392, 413; B. A. 45, 48–51, 57–58, 61, 116–119, 124–126, 128–129, 135–136, 138–139); petitioner withheld unqualified recognition though the Guild admittedly represented a majority of the employees in an appropriate unit (B. A. 392–394, 395–396; B. A. 54–55, 94, 107, 219–220, 244, 272–274, 278–279, 335, 379); petitioner undercut the Guild's authority by entering into individual contracts with Guild members (B. A. 395, 397–400, 413; B. A. 60, 74–75, 131, 147, 158, 160, 162, 193–194, 274–275, 341, 358); and petitioner financed the unsuccessful efforts of its city editor to resist by legal process his ouster from the Guild (B. A. 401–403, 413; B. A. 37, 55–56, 71, 114–115, 118–120, 134–135, 212, 216–218, 220–221, 227–228, 258–259).

still employed among those who had adhered to the position that the Guild should oust petitioner's city editor from membership in the union. (B. A. 405–409; B. A. 40–42, 66–77, 80–81, 85–86, 89, 104–105, 110–111, 115, 120–121, 212–213, 218, 240, 247–249, 317–318, 343, 345–350.) Petitioner's explanation that Fahy was discharged to reduce expenses and because she was incompetent is not supported by the evidence (B. A. 409–412; B. A. 62–66, 81–85, 88, 96–99, 119, 151–152, 175–180, 188, 197–199, 201–209, 224–226, 230–234, 250–257, 266–267, 301, 305, 309–317, 323, 340–341, 368–369, 370–372, 377–378, 380).

The Board accordingly rejected the explanations assigned by petitioner for Fahy's discharge, and found that she had been discriminatorily discharged because of her Guild membership and activity (B. A. 413–414). The Board concluded that petitioner had violated section 8 (3) and (1) of the Act (B. A. 414, 416). The Board's order directed petitioner to cease and desist from its unfair labor practices and generally from violations of section 8 (1), to reinstate Fahy with back pay, and to post notices (B. A. 416–417).

On September 27, 1940, the Board filed in the court below a petition for enforcement of its order (B. A. 5–8); petitioner answered (R. 1–26). On February 3, 1941, the court, consisting of Judges Maris, Clark, and Goodrich, handed down its opinion setting aside the order of the Board (R.

27–32). On February 7, 1941, before any decree was entered, the same three-judge court on its own motion entered an order directing reargument of the case before the court sitting *en banc* (R. 32).[4] On April 17, 1941, a court composed of the five judges in active service, with Clark, J., dissenting, handed down its opinion enforcing the Board's order except for the general cease and desist provision (R. 46–66).[5] A decree was entered accordingly on May 2, 1941 (R. 67–68). On May 9, 1941, after the decision of this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, last Term, petitioner filed a petition for modification of the decree (R. 69–73), which was denied on May 20, 1941 (R. 76).

ARGUMENT

1. This Court has granted a writ of certiorari in a case which presents the question whether the court below may validly act *en banc*. *Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue,* No. 34, this Term, certiorari granted, March 31, 1941. Accordingly, as in *Oughton* v. *National Labor Relations Board,* No. 98, this

[4] Rule 4.1 of the court below provides for such hearings *en banc*.

[5] The "work relief" clause of the back-pay order was also eliminated in accordance with *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, and the notice provision was modified to conform to the Board's present practice (R. 52).

Term, pending on petition for certiorari, the Government does not oppose either holding the present petition until the decision in the *Textile Mills* case, or granting the writ limited to review of this issue.

We respectfully submit, however, that the remaining questions do not warrant review.

2. Petitioner's contention (Pet. 6–7, 9–16) that if an employer has entered into a collective agreement with his employees, the Board thereafter lacks jurisdiction to maintain proceedings under the National Labor Relations Act to prevent employer conduct otherwise violative of the Act's prohibitions, is refuted by the express terms of the statute. Section 10 (a) of the Act provides that—

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive,* and shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement,* code, law, or otherwise. [Italics added.]

This provision makes plain the legislative purpose to apply the sanctions of the Act irrespective of any private agreement relating to unfair labor practices. Cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 264–269;

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426, 435.[6]

Petitioner's related contention (Pet. 7, 24–25) that despite an employer's commission of unfair labor practices, the Board cannot institute proceedings under the Act unless there is a sufficient public interest, and that the Board's determination of that issue is subject to judicial review, is likewise untenable. The public interest is declared by Congress to exist by virtue of its announcement in section 1 of the Act that interferences with employee self-organization lead to labor disputes burdening and obstructing the free flow of commerce. The limitation suggested by petitioner is inconsistent with the unrestricted grant of power to the Board in section 10 (a) to prevent "any" person from engaging in "any" unfair labor practice affecting commerce.[7] See also section 10 (b)

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[6] Indeed, even in the absence of this explicit provision, it is unbelievable that Congress, had it intended to truncate the application of the Act in the manner suggested by petitioner, would have failed so to provide in clear and unmistakable language instead of declaring as it did, without qualification, that "It shall be an unfair labor practice for an employer" to engage in the conduct proscribed in section 8 of the Act.

[7] Petitioner does not contend that the Board must always expressly find that the public interest justifies the maintenance of a proceeding. It contends, instead, that the public interest is absent in the instant case because of the existence of a collective agreement out of which private rights and remedies flow to those against whom there has been discrimination. But in the light of the declaration of congressional

of the Act; *Jacobsen* v. *National Labor Relations Board,* 120 F. (2d) 96 (C. C. A. 3).

3. Petitioner's contention (Pet. 7, 16–24) that the Board's findings of discriminatory discharge are unsupported by substantial evidence does not call for additional review. The evidence summarized in the Statement (*supra,* pp. 3–5) affords full support for the findings, which were sustained by the court below (R. 28, 49). Compare *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461.[8]

4. Petitioner contends (Pet. 7, 25–27) that the decision below is in probable conflict with *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, last Term, in failing to direct a remand to the Board for determination (a) of the specific amount of back pay due to Fahy, and (b) of the amount which Fahy "failed without excuse to earn." In respect of (a), the claim of

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policy, it is plain that there is a permeating public interest in the correction of practices proscribed by Congress as unfair and declared by it to lead to obstructions upon the free flow of commerce. The public interest does not disappear, and the public responsibility of the Board, which has been entrusted with the task of preventing these obstructions, does not dissolve, simply by virtue of a private agreement to observe the strictures of the Act.

[8] The trial examiner (R. A. 387) and a majority of the Board (R. A. 413–414) found that the discharge was discriminatory. All the members of the three-judge (R. 28) and of the five-judge (R. 49, 53) courts held that the Board's findings were supported by sufficient evidence.

conflict is clearly without substance; there is no requirement in the *Phelps Dodge* case of computation by the Board of the specific amount of back pay due.[9] Similarly, in respect of petitioner's second claim, the present decision is consistent with the *Phelps Dodge* case. Here petitioner was "allowed to go to proof" (the *Phelps Dodge* case, pamph., p. 16) on the issue; it examined Fahy's efforts to obtain other employment (P. A. 21, 29–31), and adduced testimony that she had unsuccessfully sought to obtain two different jobs (*ibid.*). The petitioner thus failed, despite full opportunity, to show that Fahy was guilty of a "clearly unjustifiable refusal to take desirable new employment" or that she had "willfully incurred" losses (the *Phelps Dodge* case, pamph., pp. 14, 15). In these circumstances enforcement of the Board's order presents no conflict with the *Phelps Dodge* decision.[10]

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[9] Such a computation, indeed, would be impossible at this time; the computation cannot be made until petitioner has complied (which it has not) with the Board's order, for the back pay runs until the date of an offer of reinstatement (B. A. 417).

[10] Petitioner claims (Pet. 27) conflict with the subsequent decision of the court below in *National Labor Relations Board* v. *Suburban Lumber Co.*, decided June 30, 1941 (C. C. A. 3). That case apparently turned on facts which, in the court's view, disclosed (unlike the facts in the principal case) failure by the employees to mitigate their damages. Moreover, insofar as the *Suburban Lumber* case applies common law mitigation of damage principles, it is contrary to the *Phelps Dodge* case in which the Court expressly

5. Although the court below set aside the general cease and desist order (R. 51–52), petitioner still complains (Pet. 7, 27–29) of the provision restraining it from discouraging membership in the Guild or any other labor organization by discrimination in regard to hire or tenure of employment. Since the court sustained the Board's findings that petitioner, by discriminatory discharge, had violated the Act, the limited cease and desist order enforced by the court falls clearly within the principle that "the Board is free to restrain the practice and other like or related unlawful acts." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436. Upon like findings identical orders have been sustained without exception by this and all other reviewing courts.

Petitioner's additional objection (Pet. 7, 29) to the notice provision of the order is similarly unsound. The notice directed by the Board is indisputably an "appropriate bulletin" (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 24) which the Board may validly require to convey to the employees "the knowledge of a guarantee of an unhampered right in the future to determine their labor affiliations." *National Labor Relations Board* v. *Falk*

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disclaimed application of the doctrine of "minimization of damages." Any conflict between the *Phelps Dodge* and *Suburban Lumber* cases would more properly be resolved in the latter case than in the present one, which is entirely consistent with the *Phelps Dodge* case.

Corp., 308 U. S. 453, 463; see also *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 263, 268, 271.[11]

CONCLUSION

With the exception of the power of the court below to sit *en banc*, no question requiring review is presented. If the writ be granted, it is suggested that it be limited accordingly.

Respectfully submitted.

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National Labor Relations Board.

AUGUST 1941.

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[11] Petitioner is mistaken in asserting (Pet. 29) that the form of notice required in this case is a "departure from the Board's usual practice." See *Third Annual Report of the National Labor Relations Board* (Gov't Printing Office, 1939), p. 214.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 307

NEWARK MORNING LEDGER COMPANY, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR NEWARK MORNING LEDGER COMPANY, PETITIONER

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REPLY MEMORANDUM FOR NEWARK MORNING LEDGER COMPANY, PETITIONER

Petitioner respectfully submits this reply memorandum, the argument being presented hereunder in the same order as the questions are presented in the original petition (pp. 6-7).

1. *The constitution of the Circuit Court of Appeals:* The Government does not oppose review of this question (Mem. pp. 6-7).

2. *The jurisdiction of the Board during the existence of a true collective bargaining contract:* The Government's position is opposed to the voluminous authorities and extensive source materials referred to in the petition and in the dissenting opinion of Judge CLARK in the Court below. No effort has been made in the Government's Memo-

randum to dispute, distinguish or deny the soundness of these authorities, or to submit any like material in opposition.

The Government relies chiefly, if not solely, upon the language of Section 10 (a), pressing for a strictly literal interpretation of that section. Stressing the word "agreement" the Government contends that it was the legislative purpose to apply the sanctions of the Act irrespective of any private agreement. This argument completely ignores the legislative history of Section 10 (a) which, as pointed out in the petition (pp. 14-15), establishes that the "agreement" referred to in that Section is not a private collective bargaining contract, but the "President's Re-employment Agreements" under the National Industrial Recovery Act (U. S. C. Supp. VII, Title 15, Secs. 701-712), and only to the extent that these agreements prescribe "means of adjustment or prevention". Also, the legislative history reveals that the whole purpose of the second sentence of Section 10 (a) was merely to centralize in the Board all of the administrative functions under the Act, thereby avoiding the confusion and duplication which existed under the National Industrial Recovery Act.

The Board is empowered to prevent "unfair labor practices". That expression is not a term of general application. It is a statutory definition of the practices listed in Section 8 and refers to the prohibited employer tactics which tend to deprive employees of their rights under Section 7. By a collective bargaining contract the employee's rights under Section 7 are confirmed and protected. A discharge in violation of that agreement is not an "unfair labor practice" within the statute. As pointed out in the original opinion in the Court below such a discharge "cannot possibly have the effect of interfering with, restraining, or coercing the employees in exercising a right of collective bargaining which has already been fully and successfully exercised by them" (R. 31).

Since the filing of the petition herein our attention was called to the recent decision in *N. L. R. B.* v. *Air Asso-*

ciates, Inc., ... F. (2d) ....., decided July 9, 1941, in the Circuit Court of Appeals, Second Circuit. There the Court, in an opinion by FRANK, J., held that even in the absence of a collective agreement a discharge was not an unfair labor practice within the Act, although made with the *purpose* of discouraging membership in a labor organization unless it was shown that it had the *effect* of discouraging such membership. We submit that where there is an existing valid collective contract, a discharge in violation of such a contract cannot have the *effect* of discouraging membership in a labor organization within the meaning of the statute since the agreement itself is the best evidence of effective employee organization, and a discharge in violation thereof is immediately and adequately remediable through the courts. This private remedy is an effective deterrent against discharge for union activity rendering unnecessary and inapplicable the sanctions under the statute.

Finally, we again urge that the very fact that the Court below wrote two diametrically opposite opinions on this very question of itself warrants review by this Court.

3. *The lack of substantial evidence to support the Board's findings:* The decision in *N. L. R. B.* v. *Air Associates, Inc., supra*, has an immediate and direct relationship to this question. In the language of the Court in that case:

> "Section 8 (3) requires that the discrimination in regard to tenure of employment have both the purpose and *effect* of discouraging union membership. The Board made a clear finding that the *purpose* of the discharges was to discourage membership in the union, and we think that finding was sufficiently supported by evidence to the effect that (1) the discharges, which preceded the reinstatement of the committeemen by one day, were not in fact necessary, and (2) anti-union statements were made to the two men at the time of their discharges. But we can discover no satisfactory

> explanation by the Board which would permit a finding that the unlawful purpose had the *effect* required by the act."

In this case not only is there no evidence that Fahy's discharge had the *effect* of discouraging union membership, the record affirmatively shows that it did not have that effect. The collective agreement which was in existence at the time of Fahy's discharge has been renewed year after year since then. The union has remained in continuous existence and has continued to function as the bargaining agent for the editorial employees of petitioner. Hence, we respectfully contend that this fact, in addition to the matters set forth in the petition, establishes that the Board's finding that Fahy's discharge discouraged membership in the Guild is without substantial foundation.

4. *The absence of any public interest:* This subject is treated by the Government as part of the issue pertaining to the jurisdiction of the Board during the existence of a collective bargaining contract, discussed under subdivision "2" in the Government's Memorandum (p. 8). The Government assumes that they are related questions. In fact, they are not. The only connection, in the instant case, is that the existence of the collective contract which is one of the factors establishing the absence of a public interest also establishes the Board's lack of jurisdiction.

The Government's contention is that every violation of the Act, no matter how insubstantial, *ipso facto* affects the public interest, and that the exercise of jurisdiction by the Board rests in its own untrammeled discretion beyond judicial review. This contention conflicts directly with the holding of this Court in *Federal Trade Commission* v. *Klesner,* 280 U. S. 19. Also, it is in conflict with the view expressed in the prevailing opinion in the Court below in the following quotation (R. 51):

> "The jurisdiction is not to be exercised unless in the opinion of the Board the unfair labor practice complained of interferes so substantially with

> the public rights created by Section 7 as to require its restraint in the public interest. As we have seen, the mere fact that a private right of an employee has been infringed by the act of an employer is not of itself sufficient to bring the Board's powers into play."

The public interest which Congress, in Section 1 of the Act declared to exist, pertains only to the period preceding collective bargaining. It is during that period that the employees have neither private rights nor private remedies. And it is during that period that there exists the need for the public remedy which is the basis of the public interest. As Judge CLARK pointed out in his dissenting opinion, it is the "unredressed" destruction of employees' rights which the Act was intended to eliminate (R. 57).

The case of *Jacobsen* v. *N. L. R. B.*, 120 F. (2d) 96, cited by the Government, is not in point. There, by way of dictum, the Court referred to its lack of authority to review the Board's determination, in its discretion, *not to proceed.*

5. *The directions in the order pertaining to the back pay:* It appears to be the position of the Government that the *Phelps Dodge* case is not applicable for the reason that Fahy was not guilty of a "clearly unjustifiable refusal to take desirable new employment". We respectfully submit that the rule established by the *Phelps Dodge* case, if interpreted as the Government urges, could readily become wholly inoperative. By the simple expedient of making no efforts to obtain other employment, a discharged employee could never be guilty of a "refusal to take desirable new employment".

The Government's contention that, in the *Phelps Dodge* case, this Court "expressly disclaimed application of the doctrine of 'minimization of damages'" (Mem. p. 10, footnote 10) is not sustained by the opinions in that case. The prevailing opinion, and even more clearly, the dissenting opinion of Mr. Justice MURPHY, we believe, indicate an acceptance of that doctrine.

With respect to whether or not the Board should compute the amount of back pay, we respectfully submit that the Government's contention that there is no such requirement in the *Phelps Dodge* case is opposed to this Court's explicit holding that: "The matter should have been left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings."

The Government's claim of administrative difficulties (Mem. p. 10, footnote 9) was disposed of by this Court in the *Phelps Dodge* case.

6. *The form of the Board's Order:* The Government does not clearly state the petitioner's position. The petitioner's objection is not addressed to the provision in the Order restraining it from discouraging membership in the Guild. It is directed to that part of the Order which purports to restrain the petitioner from discouraging membership in "any other labor organization". So far as the opinion discloses, that precise situation was not present in *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, but it is significant that the Order in that case restrained the employer from interfering with the Guild only; it did not include "any other labor organization". The fact is that there are other labor organizations whose members are employed by petitioner, and this fact is not controverted by the Government. The rights and relations between the petitioner and these other unions were not involved in this proceeding, and, of course, were not litigated. There should, therefore, be no reference to them in the Order which, by its terms, creates the implication that petitioner has in some way violated the Act in its dealings with such other unions.

With particular reference to Section 2 (c) of the Board's Order (R. 68) there appears to be a difference between the Government and the petitioner with respect to whether the Board followed its usual practice. The Government (Mem. p. 12, footnote 11) suggests that the petitioner is mistaken in asserting that the order in this respect is

a departure from the Board's usual practice, and refers to the Third Annual Report of the National Labor Relations Board. Petitioner respectfully submits that it is not mistaken and that it is, in fact, the Board that appears to be under a misapprehension. This is not only confirmed by the very specific language of this Court in the *Express Publishing Co.* case, *supra,* but is also confirmed in the Fifth Annual Report of the National Labor Relations Board, page 78.

The part of Section 2 (c) of the Order to which petitioner excepts appears to concern itself not with a violation of Section 8 (3) of the Act, but rather with a violation of Section 8 (1) of the Act. And it is especially to be noted that in the present case all violations under Section 8 (1) (except as incidentally involved in the discharge of Fahy) were specifically eliminated by the dismissal of such charges at the close of the Board's case (Bd. App. 386).

Moreover, this portion of "2(c)", by affirmative statement, carries the same implication of confession of guilt that was condemned by the courts in considering the negative cease and desist provisions.

Conclusion

The conclusion expressed by the Government (Mem. p. 12) that, except with respect to the power of the Court below to sit *en banc,* no question requiring review is presented by the petition appears to be inconsistent with the position publicly taken by the Board in a press release issued at the time of the reargument in the Court below. In the opening paragraph of that release the Board declared that this case "raises an important question of jurisdiction under the National Labor Relations Act". Excerpts from that release are set forth in the appendix, *infra.*

Respectfully submitted,

CHARLES GOLDMAN,
Attorney for Petitioner.

September, 1941.

APPENDIX

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D. C.

FOR RELEASE UPON DELIVERY TO THE U. S. CIRCUIT COURT OF APPEALS, AT PHILADELPHIA, PENNSYLVANIA, ON FEBRUARY 10, 1941. R-4127

Statement of Robert B. Watts, General Counsel of the National Labor Relations Board to United States Circuit Court of Appeals for the Third Circuit, upon rehearing of the Newark Morning Ledger Company case

I desire to direct my remarks briefly to the opinion heretofore rendered in this case for two reasons. First, because it raises an important question of jurisdiction under the National Labor Relations Act, and second, because it affords an appropriate occasion to state publicly the National Labor Relations Board's position on an important phase of administration of the federal statute. This statement has been expressly authorized by every member of the Board.

The Board thoroughly recognizes the public importance and desirability of written trade agreements. It has consistently sought to effectuate, by its administration of the National Labor Relations Act, the national policy of safeguarding the right of employees to self-organization and of protecting the right of collective bargaining, to the end that the commerce of the nation may be relieved from interruptions. * * *

* * * * * * *

On the other hand, the Board recognizes with equal force the fact that under the National Labor Relations Act, the institution of proceedings by it in any case is a matter of discretion. And in cases where written trade agreements are in existence, it states that it has and will

exercise that discretion with care and in light of the particular circumstances surrounding the case. It has often, in the past, refused to issue complaints when the unfair labor practice alleged involved a matter covered by a valid trade agreement.

Sometimes trade agreements made after a series of prior unfair labor practices specifically dispose of all of the past differences to the mutual satisfaction of the parties. If that disposition is not itself violative of the rights of employees under the Act, the Board would normally, in the exercise of its discretion, refuse thereafter to issue a complaint covering the past practices. Sometimes trade agreements following unfair practices dispose of part of the past issues and leave others undisposed of. Normally the Board would proceed thereafter only in respect to the undisposed of matters.

* * * * * *

In sum, the Board gives great weight to valid trade agreements; it seeks by all proper measures to encourage such resolution of industrial differences; it hesitates long in the exercise of its discretion to proceed in respect to matters covered by such agreements; but it submits that if, in the exercise of its discretion, it decides to proceed in respect to an unfair labor practice notwithstanding the existence of a trade agreement, it has, under the specific language of the Congress in Section 10 (a) of the Act, power and jurisdiction so to do.